

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2013

5 (Argued: November 20, 2013

Decided: June 30, 2014)

6 Docket No. 13-1614

7 _____
8 DAVID RAJAMIN, EDITH GONZALEZ LARIOS, JESUS VALDEZ, MAURICE
9 NUNEZ, ELIAS ESTRADA, IRMA ESTRADA, THERESA DOTY, ROBERT BASEL,
10 LARRY MYRON KEGEL, on behalf of themselves and a class of similarly situated
11 individuals,

12 Plaintiffs-Appellants,

13 - v. -

14 DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association,
15 individually and as Trustee of FFMLT TRUST 2005-FF8; FFMLT TRUST 2006-FF3;
16 FFML TRUST 2006-FF11; and FFMLT TRUST 2006-FF13, New York common law
17 trusts,

18 Defendants-Appellees.*
19 _____

20 Before: KEARSE, JACOBS, and B.D. PARKER, Circuit Judges.

21 Appeal from a judgment of the United States District Court for the Southern District
22 of New York, Laura Taylor Swain, Judge, dismissing, for lack of standing, and hence failure to state
23 a claim, plaintiffs-mortgagors' complaint alleging that mortgagees' assignments of the loans and

* The Clerk of Court is directed to amend the official caption to conform with the above.

1 mortgages to defendant trusts were ineffective because the assignors failed to perform certain
2 obligations under assignment agreements to which plaintiffs were not parties. See 2013 WL 1285160
3 (Mar. 28, 2013).

4 Affirmed.

5 JAMES B. SHEINBAUM, New York, New York (Borstein &
6 Sheinbaum, New York, New York; Lawrence H.
7 Nagler, Nagler & Associates, Los Angeles, California;
8 Law Office of Henry Bushkin, Los Angeles, California,
9 on the brief), for Plaintiffs-Appellants.

10 BERNARD J. GARBUTT III, New York, New York (Michael
11 S. Kraut, Morgan, Lewis & Bockius, New York, New
12 York, on the brief), for Defendants-Appellees.

13 KEARSE, Circuit Judge:

14 Plaintiffs David Rajamin et al., who mortgaged their homes in 2005 or 2006, appeal
15 from a judgment of the United States District Court for the Southern District of New York, Laura
16 Taylor Swain, Judge, dismissing their claims against four trusts (the "Defendant Trusts") to which
17 their loans and mortgages were assigned in transactions involving the mortgagee bank, and against
18 those trusts' trustee, defendant Deutsche Bank National Trust Company ("Deutsche Bank" or the
19 "Trustee"). Plaintiffs sought, on behalf of themselves and others similarly situated (the alleged "Class
20 Members"), monetary and equitable relief and a judgment declaring that defendants do not own
21 plaintiffs' loans and mortgages, on the ground, inter alia, that parties to the assignment agreements
22 failed to comply with certain terms of those agreements. No class action was certified. The district
23 court, finding that plaintiffs were neither parties to nor third-party beneficiaries of the assignment
24 agreements, and hence lacked standing to pursue these claims, granted defendants' motion to dismiss
25 the complaint for failure to state a claim. On appeal, plaintiffs contend that they plausibly asserted

1 standing and asserted plausible claims for relief. For the reasons that follow, we conclude that the
2 facts alleged by plaintiffs do not give them standing to pursue the claims they asserted, and we affirm
3 the judgment of dismissal.

4 I. BACKGROUND

5 We accept the factual allegations in plaintiffs' Third Amended Complaint (or
6 "Complaint")--which incorporated certain factual assertions, declarations, and attached exhibits
7 submitted by defendants at earlier stages of this action--as true for purposes of reviewing the district
8 court's dismissal for failure to state a claim on which relief can be granted, see, e.g., Rothstein v. UBS
9 AG, 708 F.3d 82, 90 (2d Cir. 2013), or for lack of standing, to the extent that the dismissal was based
10 on the pleadings, see, e.g., id.; Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 594 (2d Cir. 1993).
11 The principal factual allegations were as follows.

12 A. The Third Amended Complaint

13 Plaintiffs are five individuals and two married couples who had homes in California
14 and who, in 2005 or 2006, borrowed sums ranging from \$240,000 to \$1,008,000, totaling \$3,776,000,
15 from a bank called First Franklin, a division of National City Bank of Indiana ("First Franklin"). Each
16 plaintiff executed a promissory note secured by a deed of trust on the home--"equivalent to a
17 mortgage" under California law, Monterey S.P. Partnership v. W.L. Bangham, Inc., 49 Cal.3d 454,
18 461, 777 P.2d 623, 627 (1989)--in favor of First Franklin.

1 The notes signed by plaintiffs stated that plaintiffs "promise[d] to pay [the stated
2 amounts of principal, plus interest] to the order of" First Franklin (Third Amended Complaint ¶ 25
3 (emphasis added)). See generally U.C.C. §§ 3-104, 3-109 (2002) (a note "payable to order" is a type
4 of negotiable instrument). The deeds of trust signed by plaintiffs, samples of which were attached to
5 the Complaint, provided in part, in sections titled "UNIFORM COVENANTS," that the parties agreed
6 that

7 [t]he Note or a partial interest in the Note (together with this Security
8 Instrument) can be sold one or more times without prior notice to Borrower.
9 A sale might result in a change in the entity (known as the "Loan Servicer")
10 that collects Periodic Payments due under the Note and this Security
11 Instrument

12 (Third Amended Complaint Exhibit E ¶ 20; id. Exhibit G ¶ 20.)

13 Deutsche Bank is the trustee of the four Defendant Trusts, which were created under
14 the laws of New York. (See Third Amended Complaint ¶¶ 12, 13.) The Defendant Trusts--whose
15 names begin with "First Franklin Mortgage Loan Trust" or the initials "FFMLT"--maintain that they
16 were created in connection with securitization transactions involving mortgage loans originated by
17 First Franklin between January 1, 2004, and January 1, 2007. (See id. ¶ 11.) See generally
18 BlackRock Financial Management Inc. v. Segregated Account of Ambac Assurance Corp., 673 F.3d
19 169, 173 (2d Cir. 2012) (Residential mortgage loans, rather than being retained by the original
20 mortgagee, may be pooled and sold "into trusts created to receive the stream of interest and principal
21 payments from the mortgage borrowers. The right to receive trust income is parceled into certificates
22 and sold to investors, called certificateholders. The trustee hires a mortgage servicer to administer
23 the mortgages by enforcing the mortgage terms and administering the payments. The terms of the

1 securitization trusts as well as the rights, duties, and obligations of the trustee, seller, and servicer are
2 set forth in a Pooling and Servicing Agreement")

3 The Complaint alleged that defendants claim to have purchased plaintiffs' loans and
4 mortgages, through intermediaries, from First Franklin (see Third Amended Complaint ¶ 28) and to
5 have "the right to collect and receive payment on [plaintiffs'] loans . . . pursuant to written
6 agreements" (id. ¶¶ 30-31). Each securitization transaction involved written agreements (the
7 "assignment agreements"), one of which was called a Pooling and Servicing Agreement ("PSA"). The
8 PSAs, which by their terms are to be governed by New York law (see id. ¶ 29), "provided, inter alia,
9 for the formation of the relevant Trust, the conveyance of a pool of mortgages to [Deutsche
10 Bank],[]as trustee, the issuance of mortgage-backed securities representing interests in the pooled
11 loans, and the servicing of the pooled loans by a loan servicer" (id. ¶ 28 (internal quotation marks
12 omitted)). Defendants claim that in each such transaction, First Franklin sold a pool of mortgage
13 loans "to a sponsor . . . which, at closing, sold the loans through its affiliate, a depositor . . . , to a
14 trust." (Id. ¶ 63 (internal quotation marks omitted).) Thus, the intention of the parties to the sales and
15 securitization transactions was that Deutsche Bank would become, "as Trustee, . . . the legal owner
16 and holder of [the] Notes and [deeds of trust]" originated by First Franklin (id. ¶ 28 (internal quotation
17 marks omitted)).

18 1. Plaintiffs' Challenges to the Assignments

19 The Complaint challenged defendants' (a) ownership of plaintiffs' loans and mortgages,
20 (b) right to collect and receive payment on the loans, and (c) right to commence or authorize the

1 commencement of foreclosure proceedings where payments have not been made or received (see, e.g.,
2 Third Amended Complaint ¶¶ 32, 80, 120, 122, 123, 126), on the ground, inter alia, that there was a
3 lack of compliance with provisions of the assignment agreements. First, the Complaint alleged that
4 the assignments were defective because plaintiffs' mortgage loans were "not specifically list[ed]" in
5 mortgage loan schedules or other attachments to the assignment agreements. (Id. ¶¶ 36, 52; see also
6 id. ¶ 66.) Indeed, according to the Complaint, the assignment agreements did "not specifically list any
7 promissory note, mortgage or deed of trust" that was allegedly sold, transferred, assigned, or conveyed
8 to defendants. (Id. ¶¶ 37, 53 (emphasis added); see also id. ¶¶ 54, 59, 65.)

9 The Complaint also alleged that assignments by First Franklin to Deutsche Bank of
10 four of plaintiffs' deeds of trust were executed and publicly recorded in 2009 or 2010, after First
11 Franklin had ceased operations and years after the securitization transactions took place. (See id.
12 ¶¶ 74-79.) Plaintiffs argue that the execution and recordation of these mortgage assignments after the
13 securitization transactions that created the Defendant Trusts indicate that these mortgages were not
14 included in the mortgage loan pools that were sold to those trusts.

15 In addition, the Complaint alleged that two PSA provisions as to documents that were
16 to accompany the conveyance of loans and mortgages to the trusts were not complied with at the time
17 of the securitization transactions. These were (a) a provision stating that an affiliate of the sponsor
18 "has delivered or caused to be delivered to" a named custodian "the original Mortgage Note bearing
19 all intervening endorsements necessary to show a complete chain of endorsements from the original
20 payee" (Third Amended Complaint ¶ 38 (internal quotation marks omitted); see id. ¶¶ 40-42), and (b)
21 a similar provision as to delivery of "the originals of all intervening assignments of Mortgage with

1 evidence of recording thereon evidencing a complete chain of ownership from the originator of the
2 Mortgage Loan to the last assignee" (id. ¶ 43 (internal quotation marks omitted); see id. ¶¶ 46-48; see
3 also id. ¶¶ 69-73).

4 2. Alleged Injury to Plaintiffs

5 The Complaint implied that plaintiffs made their loan payments to Deutsche Bank and
6 the Defendant Trusts. It alleged that "Defendants claim[ed] and assert[ed] that payments [we]re due
7 to them monthly" (Third Amended Complaint ¶ 119), and that defendants "received and collected
8 money from payments made by Lead Plaintiffs and Class Members" (id. ¶ 95; see also id. ¶¶ 104, 115)
9 "based upon Defendants' claims of rights, title and interest in the loans in issue in this Action" (id.
10 ¶ 115; see also id. ¶ 81 ("The proposed class is all persons who took loans originated by First Franklin
11 in 2004, 2005 and 2006 and for which Deutsche [Bank] claims to act as the trustee and for which
12 Defendant Trusts have received or collected payments since January 1, 2004.")). The Complaint also
13 alleged that "Defendants have commenced or authorized the commencement of foreclosure
14 proceedings where payments have not been made or received" (id. ¶ 123), and that "[i]ndividuals and
15 families have lost their homes and real property in foreclosure proceedings based upon the loans
16 (including promissory notes, deeds of trust and mortgages) in issue in this Action" (id. ¶ 124).

17 The Complaint alleged that--and sought a declaratory judgment that--as a result of the
18 alleged failures with regard to the assignment agreements, "Deutsche [Bank] and Defendant Trusts
19 have not obtained ownership over and do not own [plaintiffs'] []promissory notes and deeds of trust"
20 (Third Amended Complaint ¶ 80) and have no "right to collect and receive payment on the [mortgage]

1 loans" (id. ¶ 32) and no "right to foreclose on [plaintiffs'] real property . . . in the event that payments
2 are not made" (id. ¶ 120).

3 While alleging that defendants received and collected money from plaintiffs that
4 defendants "were not entitled to receive and collect" (Third Amended Complaint ¶ 95) and seeking
5 as restitution and as damages "all payments on the mortgage loans in issue money [sic] collected and
6 received by Deutsche [Bank] and Defendant Trusts and their servicers, agents, employees and
7 representatives" (id. WHEREFORE ¶¶ (a) and (b); see also id. ¶¶ 95-112), the Complaint did not
8 allege or imply that any plaintiff or putative Class Member made loan payments in excess of amounts
9 due, made loan payments to any entity other than defendants, or was subjected to duplicate billing or
10 duplicate foreclosure actions.

11 B. The Dismissal of the Complaint

12 Defendants moved to dismiss the Third Amended Complaint on the ground, inter alia,
13 that plaintiffs lacked standing to pursue claims based on alleged violations of agreements to which
14 plaintiffs are not parties. In an opinion filed on March 28, 2013, the district court granted the motion
15 to dismiss the Complaint for failure to state a claim on which relief can be granted, finding that
16 plaintiffs lacked standing to challenge defendants' ownership of the notes and mortgages based on
17 alleged noncompliance with the terms of the PSAs. See Rajamin v. Deutsche Bank National Trust
18 Co., No. 10 Civ. 7531, 2013 WL 1285160, at *3-*4 (S.D.N.Y. Mar. 28, 2013). The court pointed out
19 that

20 Plaintiffs do not claim to have been parties to the PSAs, and none of
21 the PSAs includes provisions indicative of party status for borrowers or

mortgagors. The weight of caselaw throughout the country holds that a non-party to a PSA lacks standing to assert noncompliance with the PSA as a claim or defense unless the non-party is an intended (not merely incidental) third party beneficiary of the PSA.

Id. at *3. The court stated that "[t]he intent to render a non-party a third-party beneficiary must be clear from the face of the PSA," and that

Plaintiffs have not alleged any facts that would support plausibly a claim that they are intended third-party beneficiaries of the PSAs. Thus, Plaintiffs lack standing to challenge Defendants' alleged ownership of the Notes and [deeds of trust] or authority to foreclose based on non-compliance with the PSAs.

Id.

In addition, the district court noted the Complaint's allegation that mortgage loan schedules accompanying the assignment agreements did not reflect plaintiffs' loans. The court rejected that allegation as baseless, finding that the mortgage loan schedules in question, submitted by defendants in support of their motion to dismiss the Third Amended Complaint, do in fact identify the relevant loans. See *id.* at *3 n.2.

II. DISCUSSION

On appeal, plaintiffs contend that the district court erred in dismissing the Complaint, arguing, inter alia, that they have a "concrete interest in putting to the test Defendants' claims to own [plaintiffs'] mortgages and mortgage documents." (Plaintiffs' brief on appeal at 13.) Although it is not clear whether the status of plaintiffs' mortgages was in the record before the district court in 2013 when it dismissed the complaint, it is now undisputed that "[i]n 2009 or 2010, each Plaintiff was

1 declared to be in default on his [sic] mortgage, and foreclosure proceedings were instituted" (id. at 5);
2 that "[i]n connection with the institution of said foreclosure proceedings, Deutsche [Bank], as trustee
3 of one of the Defendant Trusts, claimed to own each Plaintiff's mortgage" (id. (citing the Third
4 Amended Complaint)); and that "Plaintiffs are not seeking to enjoin foreclosure proceedings"
5 (Plaintiffs' brief on appeal at 5 n.2). Assuming that these concessions have not rendered plaintiffs'
6 claims moot, we affirm the district court's ruling that plaintiffs lack standing to pursue their challenges
7 to defendants' ownership of the loans and entitlement to payments.

8 "[T]he question of standing is whether the litigant is entitled to have the court decide
9 the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations
10 on federal-court jurisdiction and prudential limitations on its exercise." Warth v. Seldin, 422 U.S.
11 490, 498 (1975). The plaintiff bears the burden of establishing such standing. See, e.g., Lujan v.
12 Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (constitutional standing); Premium Mortgage
13 Corp. v. Equifax, Inc., 583 F.3d 103, 108 (2d Cir. 2009) (prudential standing). We review de novo
14 a decision as to a plaintiff's standing to sue based on the allegations of the complaint and the
15 undisputed facts evidenced in the record. See, e.g., Rent Stabilization Ass'n v. Dinkins, 5 F.3d at 594.
16 "[I]f the court also resolved disputed facts" in ruling on standing, "we will accept the court's findings
17 unless they are 'clearly erroneous.'" Id. For the reasons that follow, we conclude that plaintiffs
18 established neither constitutional nor prudential standing to pursue the claims they asserted.

19 A. Constitutional Standing

20 The "irreducible constitutional minimum of standing" under Article III of the

1 Constitution includes the requirement that "the plaintiff must have suffered an injury in fact . . . which
2 is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical."
3 Lujan v. Defenders of Wildlife, 504 U.S. at 560 (internal quotation marks omitted). The record in this
4 case reveals that plaintiffs' Third Amended Complaint alleged only injuries that were hypothetical.
5 The chronology of the events alleged helps to make this clear.

6 Plaintiffs alleged that their loan and mortgage transactions with First Franklin took
7 place in 2005 or 2006 (see Third Amended Complaint ¶¶ 2-8); that "Defendants claim[ed] and
8 assert[ed] that payments [we]re due to them monthly" (id. ¶ 119); and that, for the loans taken out by
9 plaintiffs and the members of the class they seek to represent, "Defendant Trusts have received or
10 collected payments since January 1, 2004" (id. ¶ 81). Plaintiffs asserted that they "[we]re suffering
11 damages with each and every payment to Defendants," on the theory that defendants "[we]re not
12 proper parties to receive and collect such payments." (Id. ¶ 122.) But plaintiffs acknowledge that
13 they took out the loans in 2005 or 2006 and were obligated to repay them, with interest; and they have
14 not pleaded or otherwise suggested that they ever paid defendants more than the amounts due, or that
15 they ever received a bill or demand from any entity other than defendants. Thus, there is no allegation
16 that plaintiffs have paid more than they owed or have been asked to do so.

17 Further, plaintiffs' challenge to defendants' claim of ownership of plaintiffs' loans,
18 implying that the loans are owned by some other entity or entities, is highly implausible, for that
19 would mean that since 2005 there was no billing or other collection effort by owners of loans whose
20 principal alone totaled \$3,776,000. The suggestion that plaintiffs were in imminent danger--or,
21 indeed, any danger--of having to make duplicate loan payments is thus entirely hypothetical.

1 For the same reason, the Complaint's assertion that "Defendants have commenced or
2 authorized the commencement of foreclosure proceedings where payments have not been made or
3 received" (Third Amended Complaint ¶ 123) does not indicate an actual or imminent, rather than a
4 conjectural or hypothetical, injury. Plaintiffs have acknowledged on this appeal that they were
5 declared in default on their mortgages, and that foreclosure proceedings were instituted by Deutsche
6 Bank, claiming to own those mortgages, in 2009 or 2010. Just as there was no allegation in the
7 Complaint that any entity other than defendants had demanded payments, there was no allegation of
8 any threat or institution of foreclosure proceedings against any plaintiff by any entity other than
9 defendants. And had there been any entity that asserted a claim conflicting with the right of Deutsche
10 Bank to foreclose on plaintiffs' mortgages, surely the interposition of such a claim would have been
11 alleged in the Third Amended Complaint, which was not filed until 2011.

12 On appeal, plaintiffs purport to assert injury by arguing that the alleged defects in the
13 assignments of their mortgages would prevent Deutsche Bank from being able to reconvey clear title
14 to plaintiffs when they pay off their mortgage loans. (See Plaintiffs' brief on appeal at 13, 17.) We
15 note that such an injury was not alleged in the Complaint, and it is difficult to view it as other than
16 conjectural or hypothetical, given that plaintiffs, several years ago, defaulted on their loans. See, e.g.,
17 Rajamin v. Deutsche Bank National Trust Co., No. B237560, 2012 WL 5448401, at *1-*3 & n.3 (Cal.
18 Ct. App. 2d Dist. Nov. 8, 2012) ("Rajamin's California case") (affirming dismissal, for lack of
19 standing, of Rajamin's claim for declaratory relief as to Deutsche Bank's ownership of his promissory
20 note, and noting that Rajamin's home had been sold in foreclosure).

1 We conclude that plaintiffs failed to allege injuries sufficient to show constitutional
2 standing to pursue their claims.

3 B. Prudential Standing

4 Even if plaintiffs had Article III standing, we conclude that they lack prudential
5 standing. The "prudential standing rule . . . normally bars litigants from asserting the rights or legal
6 interests of others in order to obtain relief from injury to themselves." Warth v. Seldin, 422 U.S.
7 at 509. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his
8 claim to relief on the legal rights or interests of third parties." Id. at 499. Plaintiffs have advanced
9 several theories for prudential standing. Each fails.

10 1. The Breach-of-Contract Theory

11 The principles that any contractual provision "may be waived by implication or express
12 intention of the party for whose benefit the provision inures," Wolff & Munier, Inc. v. Whiting-Turner
13 Contracting Co., 946 F.2d 1003, 1009 (2d Cir. 1991) (internal quotation marks omitted), and that
14 strangers may not assert the rights of those who "do not wish to assert them," Singleton v. Wulff, 428
15 U.S. 106, 113-14 (1976) (plurality opinion), underlie the rule adhered to in New York--whose law
16 governs the assignment agreements (see Third Amended Complaint ¶ 29)--that the terms of a contract
17 may be enforced only by contracting parties or intended third-party beneficiaries of the contract, see,
18 e.g., Mendel v. Henry Phipps Plaza West, Inc., 6 N.Y.3d 783, 786, 811 N.Y.S.2d 294, 297 (2006)
19 (mere incidental beneficiaries of a contract are not allowed to maintain a suit for breach of the

1 contract); see also Restatement (Second) of Contracts § 315 (1981) ("An incidental beneficiary
2 acquires by virtue of the promise no right against the promisor or the promisee.").

3 This rule has been applied to preclude claims where mortgagors have sought relief
4 from their loan obligations on grounds such as those asserted here. See, e.g., Cimerring v. Merrill
5 Lynch Mortgage Investors, Inc., No. 8727/2011, 2012 WL 2332358, at *9 (N.Y. Sup. Ct. Kings Co.
6 June 13, 2012) ("plaintiffs lack standing to allege a claim for breach of the PSA because they are not
7 parties to this contract, nor do they allege that they are third-party beneficiaries to the agreement");
8 see generally Reinagel v. Deutsche Bank National Trust Co., 735 F.3d 220, 228 n.29 (5th Cir. 2013)
9 ("courts invariably deny mortgagors third-party status to enforce PSAs"). Indeed, in an action brought
10 by a successor trustee of another First Franklin mortgage loan trust, the Appellate Division of the New
11 York Supreme Court ("Appellate Division") ruled that mortgagors lack standing to assert such
12 breaches, citing as authority the opinion of the district court in this very case: While holding that the
13 plaintiff bank was not entitled to summary judgment in its action to foreclose the defendants'
14 mortgage, the Appellate Division affirmed the lower court's denial of the defendant mortgagors'
15 motion to dismiss the foreclosure complaint, ruling that the defendants

16 did not have standing to assert noncompliance with the subject lender's pooling
17 service agreement (see Rajamin v Deutsche Bank Natl. Trust Co., . . . 2013
18 WL 1285160, 2013 US Dist LEXIS 45031 [SD NY 2013]).

19 Bank of New York Mellon v. Gales, 116 A.D.3d 723, 725, 982 N.Y.S.2d 911, 912 (2d Dep't 2014).

20 Here, plaintiffs contend that their loans were not acquired by the Defendant Trusts
21 pursuant to the assignment agreements--of which the PSAs were part--because, plaintiffs allege,
22 parties to those agreements did not perform all of their obligations under the PSAs. Although

1 noncompliance with PSA provisions might have made the assignments unenforceable at the instance
2 of parties to those agreements, the district court correctly noted that plaintiffs were not parties to the
3 assignment agreements. And plaintiffs have not shown that the entities that were parties to those
4 agreements intended that plaintiffs--whose financial obligations were being bought and sold--would
5 in any way be beneficiaries of the assignments. We conclude that the district court properly ruled that
6 plaintiffs lacked standing to enforce the agreements to which they were not parties and of which they
7 were not intended beneficiaries.

8 Plaintiffs also argue that the district court's third-party-beneficiary analysis was flawed
9 because "Plaintiffs are first parties to their mortgage notes and deeds of trust" (Plaintiffs' brief on
10 appeal at 17 (emphasis added)). This argument is far wide of the mark. Plaintiffs are not suing for
11 breach or nonperformance of their loan and mortgage agreements; those agreements provide, inter
12 alia, that plaintiffs' loans "can be sold one or more times without prior notice to [the b]orrower" (Third
13 Amended Complaint Exhibit E ¶ 20; id. Exhibit G ¶ 20). The notes and deeds of trust to which
14 plaintiffs were parties did not confer upon plaintiffs a right against nonparties to those agreements to
15 enforce obligations under separate agreements to which plaintiffs were not parties.

16 2. The Breach-of-Trust Theory

17 In an effort to circumvent their lack of standing to make their contract arguments,
18 plaintiffs argue that assignments failing to comply with the PSAs violated laws governing trusts.
19 They rely on a New York statute that provides: "If the trust is expressed in the instrument creating
20 the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust,

1 except as authorized by . . . law, is void." N.Y. Estates, Powers and Trusts Law ("EPTL") § 7-2.4
2 (McKinney 2002). Here, the PSAs are the instruments creating the trust estates, and plaintiffs argue
3 that the PSAs were "contraven[ed]" by the Trustee's acceptance of mortgage loans conveyed in a
4 manner that did not comply with the procedural formalities that the PSAs specified, thereby rendering
5 those conveyances void under the statute. (E.g., Plaintiffs' brief on appeal at 12.) Plaintiffs' reliance
6 on trust law is misplaced.

7 First, as the district court concluded, this argument depends on plaintiffs' contention
8 that parties to the assignment agreements violated the terms of the PSAs. If those agreements were
9 not breached, there is no foundation for plaintiffs' contention that any act by the trusts' trustee was
10 unauthorized. But as discussed above, plaintiffs, as nonparties to those contracts, lack standing to
11 assert any nonperformance of those contracts.

12 Second, under New York law, only the intended beneficiary of a private trust may
13 enforce the terms of the trust. See, e.g., Matter of the Estate of McManus, 47 N.Y.2d 717, 719, 417
14 N.Y.S.2d 55, 56 (1979) ("McManus") (persons who "were not beneficially interested in the trust . . .
15 lack[ed] standing to challenge the actions of its trustee"); Cashman v. Petrie, 14 N.Y.2d 426, 430, 252
16 N.Y.S.2d 447, 450 (1964) (mere incidental beneficiaries of a trust "cannot maintain a suit to enforce
17 the trust"); Naversen v. Gaillard, 38 A.D.3d 509, 509, 831 N.Y.S.2d 258, 259 (2d Dep't 2007); see
18 also Restatement (Third) of Trusts § 94(1) (2012) ("A suit against a trustee of a private trust to enjoin
19 or redress a breach of trust or otherwise to enforce the trust may be maintained only by a beneficiary
20 or by a co-trustee, successor trustee, or other person acting on behalf of one or more beneficiaries.");
21 cf. Rajamin's California case, 2012 WL 5448401, at *2 ("A homeowner who gives a deed of trust to

1 secure his repayment of a home loan does not have standing to challenge the foreclosing party's
2 authority to act on behalf of the deed of trust's beneficiary."). Where the challengers to a trustee's
3 actions are not beneficiaries, and hence lack standing, the court "need not decide whether the conduct
4 of the trustee comported with the terms of the trust." McManus, 47 N.Y.2d at 719, 417 N.Y.S.2d
5 at 56.

6 Third, even if plaintiffs had standing to make an argument based on EPTL § 7-2.4, on
7 the theory that a mortgagor has standing to "challenge[] a mortgage assignment as invalid, ineffective,
8 or void," Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 354 (1st Cir. 2013) (internal quotation
9 marks omitted), the weight of New York authority is contrary to plaintiffs' contention that any failure
10 to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and
11 mortgages void as a matter of trust law. Under New York law, unauthorized acts by trustees are
12 generally subject to ratification by the trust beneficiaries. See King v. Talbot, 40 N.Y. 76, 90 (1869)
13 ("[t]he rule is perfectly well settled, that a cestui que trust is at liberty to elect to approve an
14 unauthorized investment, and enjoy its profits, or to reject it at his option"); Mooney v. Madden, 193
15 A.D.2d 933, 933-34, 597 N.Y.S.2d 775, 776 (3d Dep't) ("Mooney") ("A trustee may bind the trust to
16 an otherwise invalid act or agreement which is outside the scope of the trustee's power when the
17 beneficiary or beneficiaries consent or ratify the trustee's ultra vires act or agreement . . ."), lv.
18 dismissed, 82 N.Y.2d 889, 610 N.Y.S.2d 153 (1993); Washburn v. Rainier, 149 A.D. 800, 803-04,
19 134 N.Y.S. 301, 304 (2d Dep't 1912); Hine v. Hine, 118 A.D. 585, 592, 103 N.Y.S. 535, 540 (4th
20 Dep't 1907); English v. McIntyre, 29 A.D. 439, 448-49, 51 N.Y.S. 697, 704 (1st Dep't 1898) ("where
21 the trustee has engaged with the trust fund in an unauthorized business . . . the rule is that the cestui

1 que trust may ratify the transactions of the trustee and take the profits, if there are profits").
2 Moreover, "beneficiary consent may be express or implied from the acceptance of the trustee's act or
3 agreement and may be given either after or before the trustee's act" Mooney, 193 A.D.2d at 934,
4 597 N.Y.S.2d at 776. To be an effective ratification, however, "all of the beneficiaries" must
5 "expressly or impliedly" agree. Id. at 933, 597 N.Y.S.2d at 776; see also id. at 934, 597 N.Y.S.2d
6 at 776 (remanding for determination of whether "remainder persons who also [we]re beneficiaries"
7 had "consented . . . and/or ratified").

8 The principle that a trustee's unauthorized acts may be ratified by the beneficiaries is
9 harmonious with the overall principle that only trust beneficiaries have standing to claim a breach of
10 trust. If a stranger to the trust also had such standing, the stranger would have the power to interfere
11 with the beneficiaries' right of ratification.

12 Because, as the above authorities demonstrate, a trust's beneficiaries may ratify the
13 trustee's otherwise unauthorized act, and because "a void act is not subject to ratification," Aronoff
14 v. Albanese, 85 A.D.2d 3, 4, 446 N.Y.S.2d 368, 370 (2d Dep't 1982), such an unauthorized act by the
15 trustee is not void but merely voidable by the beneficiary.

16 For the contrary position, plaintiffs rely principally on Genet v. Hunt, 113 N.Y. 158,
17 21 N.E. 91 (1889) ("Genet"), and Wells Fargo Bank, N.A. v. Erobobo, No. 31648/2009, 2013 WL
18 1831799 (Sup. Ct. Kings Co. Apr. 29, 2013) ("Erobobo"). Neither case compels the conclusion that
19 a trustee's acceptance of property on behalf of a trust without complying with the terms of the trust
20 agreement is void.

1 In Genet, the New York Court of Appeals described the principal question before it
2 as whether certain testamentary trusts created under an 1867 will (the "bequests") constituted the
3 exercise of a power of appointment conferred by an 1853 trust deed, causing the bequests' suspension
4 of rights of alienation to date back to 1853 and to violate the rule against perpetuities--i.e., whether
5 the bequests were "void for remoteness." 113 N.Y. at 165, 21 N.E. at 92. The testatrix in Genet was
6 the settlor and a beneficiary of the 1853 trust; the trust's other beneficiaries, contingent remaindermen,
7 were the testatrix's heirs. See id. at 169, 21 N.E. at 93. The Court, en route to a conclusion that the
8 bequests must be treated as dating back to the 1853 trust and as violating the rule against perpetuities,
9 observed that a New York statutory provision (which was a predecessor to EPTL § 7-2.4) provided
10 that acts of a trustee in contravention of the trust's terms were void; the Court thus stated that the
11 settlor and income beneficiary of the trust could not "alone, or in conjunction with the trustees, . . .
12 abrogate the trust," 113 N.Y. at 168, 21 N.E. at 93 (emphasis added). The Genet Court did not advert
13 to the possibility of ratification; to be an effective ratification, there must be agreement by "all of the
14 beneficiaries," including "remainder persons who also are beneficiaries," Mooney, 193 A.D.2d at 934,
15 597 N.Y.S.2d at 776. Although the general permissibility of ratification had been described 20 years
16 before Genet as "perfectly well settled," King v. Talbot, 40 N.Y. at 90, there was no possibility in
17 Genet that all of the 1853 trust's beneficiaries could have consented to any attempted abrogation or
18 contravention of trust terms by the testatrix during her lifetime because the remainder beneficiaries,
19 the testatrix's heirs, could not be ascertained until her death. We conclude that Genet has no bearing
20 on the claims of plaintiffs in the present case.

1 Although Erobobo concerned events more similar to those in this case, as it involved
2 a mortgage, a securitization trust, and allegations of unauthorized acts by a trustee, we find it
3 unpersuasive. In Erobobo, a trial court, in denying the plaintiff bank's motion for summary judgment
4 in its foreclosure action, stated that "[u]nder New York Trust Law, every sale, conveyance or other
5 act of the trustee in contravention of the trust is void. EPTL § 7-2.4." 2013 WL 1831799, at *8. But
6 the court so stated without any citation or discussion of the New York authorities holding (a) that only
7 the beneficiary of a trust, or one acting on the beneficiary's behalf, has standing to enforce the terms
8 of the trust, and (b) that the beneficiaries may ratify otherwise unauthorized acts of the trustee.

9 While a few other courts have reached conclusions about EPTL § 7-2.4 similar to that
10 of the Erobobo court, see, e.g., Auroa Loan Services LLC v. Scheller, No. 2009-22839, 2014 WL
11 2134576, at *2-*4 (N.Y. Sup. Ct. Suffolk Co. May 22, 2014); Glaski v. Bank of America, National
12 Association, 218 Cal. App. 4th 1079, 1094-98, 160 Cal. Rptr. 3d 449, 461-64 (5th Dist. 2013), we are
13 not aware of any New York appellate decision that has endorsed this interpretation of § 7-2.4. And
14 most courts in other jurisdictions discussing that section have interpreted New York law to mean that
15 "a transfer into a trust that violates the terms of a PSA is voidable rather than void," Dernier v.
16 Mortgage Network, Inc., 2013 VT 96, ¶ 34, 87 A.3d 465, 474 (2013); see, e.g., Bank of America
17 National Ass'n v. Bassman FBT, L.L.C., 2012 IL App (2d) 110729, ¶¶ 18-21, 981 N.E.2d 1, 8-10 (2d
18 Dist. 2012); see also Butler v. Deutsche Bank Trust Co. Americas, 748 F.3d 28, 37 n.8 (1st Cir. 2014)
19 ("not[ing] without decision . . . that the vast majority of courts to consider the issue have rejected
20 Erobobo's reasoning, determining that despite the express terms of [EPTL] § 7-2.4, the acts of a
21 trustee in contravention of a trust may be ratified, and are thus voidable").

1 In sum, we conclude that as unauthorized acts of a trustee may be ratified by the trust's
2 beneficiaries, such acts are not void but voidable; and that under New York law such acts are voidable
3 only at the instance of a trust beneficiary or a person acting in his behalf. Plaintiffs here are not
4 beneficiaries of the securitization trusts; the beneficiaries are the certificateholders. Plaintiffs are not
5 even incidental beneficiaries of the securitization trusts, for their interests are adverse to those of the
6 certificateholders. Plaintiffs do not contend that they did not receive the proceeds of their loan
7 transactions; and their role thereafter was simply to make payments of the principal and interest due.
8 The law of trusts provides no basis for plaintiffs' claims.

9 3. The Nothing-Was-Transferred and Related Theories

10 In another effort to have the assignments of their mortgages to Defendant Trusts
11 categorized as absolutely void, plaintiffs argue that an attempt to assign a property right that is not
12 owned is without effect, and they assert that the entity from which defendants claim to have received
13 plaintiffs' loans and mortgages--the depositor--did not own them. Even assuming that "standing exists
14 for challenges that contend that the assigning party never possessed legal title," Woods v. Wells Fargo
15 Bank, N.A., 733 F.3d at 354, this argument suffers fatal flaws.

16 First, the Complaint did not directly allege that the depositor did not own plaintiffs'
17 loans and mortgages. Instead, noting defendants' reliance on documents pertaining to each mortgage
18 loan, the Complaint alleged that the mortgage loan schedules "do[] not specifically list" plaintiffs'
19 notes or mortgages (e.g., Third Amended Complaint ¶ 36), and indeed "do[] not specifically list any
20 promissory note, mortgage or deed of trust or name of any person or individuals" (e.g., id. ¶ 37

1 (emphasis added)). Thus, plaintiffs' voidness contention rests on the supposition that the mortgage
2 assignment agreements did not purport to assign any mortgages--or, indeed, any related interests--a
3 supposition that is entirely implausible.

4 Second, the district court noted plaintiffs' argument and concluded that it was baseless,
5 finding that the mortgage loan schedules submitted by defendants in support of their motion to dismiss
6 did in fact identify the relevant loans. See 2013 WL 1285160, at *3 n.2. Although plaintiffs, in their
7 reply brief on appeal, reiterate the implausible proposition that "no schedule specifying the loans
8 [wa]s attached" to the assignment agreements (Plaintiffs' reply brief on appeal at 7), their briefs do
9 not dispute or even mention the district court's factual finding. We therefore regard any challenge to
10 this finding as waived.

11 Lastly, we reject plaintiffs' contention that the assignments of some of plaintiffs'
12 mortgages were void because the assignments were recorded after the closing dates of the Defendant
13 Trusts or because the named assignor was First Franklin rather than the depositors named in the PSAs.
14 To the extent that plaintiffs argue that these assignments violated the PSAs, the argument, for reasons
15 already discussed, is not one that plaintiffs have standing to make. To the extent that plaintiffs rely
16 on the dates of the recorded mortgage assignments to imply that the assignments of their loans and
17 mortgages to defendants were a sham, we reject the implication as implausible. A post-closing
18 recordation does not in itself suggest that the assignments were made at the time of the recordation,
19 and the record does not give rise to such a suggestion. The PSAs themselves were sufficient to assign
20 plaintiffs' obligations to Deutsche Bank as of the assignments' effective dates. (See, e.g., First
21 Franklin Mortgage Loan Trust 2006-FF11 Pooling and Servicing Agreement, dated August 1, 2006

1 ("FFMLT 2006-FF11 PSA"), at § 2.01(a) ("The Depositor, concurrently with the execution and
2 delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the
3 benefit of the Certificateholders . . . all the right, title and interest of the Depositor in" the principal
4 and interest on the mortgage loans (emphases added)).

5 The subsequent recording of mortgage assignments does not imply that the promissory
6 notes and security interests had not been effectively assigned under the PSAs. Under the law of either
7 California or New York, when a note secured by a mortgage is assigned, the "mortgage passes with
8 the debt as an inseparable incident." U.S. Bank, N.A. v. Collymore, 68 A.D.3d 752, 754, 890
9 N.Y.S.2d 578, 580 (2d Dep't 2009); accord Domarad v. Fisher & Burke, Inc., 270 Cal. App. 2d 543,
10 553, 76 Cal. Rptr. 529, 535 (1st Dist. 1969) ("a deed of trust is a mere incident of the debt it secures
11 and . . . an assignment of the debt carries with it the security" (internal quotation marks omitted)).
12 The assignment of a mortgage need not be recorded for the assignment to be valid. See, e.g.,
13 MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 98-99, 828 N.Y.S.2d 266, 269-70 (2006); Wilson v.
14 Pacific Coast Title Insurance Co., 106 Cal. App. 2d 599, 602, 235 P.2d 431, 433 (4th Dist. 1951).
15 Thus, the recorded assignments do not support plaintiffs' contention that their loans and mortgages
16 were not owned by defendants.

17 Moreover, plaintiffs have not alleged that the promissory notes were not conveyed to
18 the Trustee in a timely manner. Section 2.01(b) of the PSAs states that documentation, including each
19 "original Mortgage Note" and each "original recorded Mortgage" "has [been] delivered . . . to the
20 Custodian." The fact that plaintiffs mount no viable challenge to the timeliness of the assignment of
21 the promissory notes scuttles their contention that the mortgages were not timely assigned.

Finally, although plaintiffs' contend that defendants do not "ha[ve] custody" of the notes (Plaintiffs' reply brief on appeal at 8 (emphasis added)), that contention does not refute defendants' claim of ownership. While the Complaint partially quotes from § 2.01(b)(1) of the FFMLT 2006-FF11 PSA, alleging that it "states in relevant part: '(b)...Depositor has delivered or caused to be delivered to Custodian... (i) the original Mortgage Note'" (Third Amended Complaint ¶ 38), the second ellipsis in that allegation omits the quite relevant words "for the benefit of the Certificateholders." Moreover, § 8.02(e) of the FFMLT 2006-FF11 PSA provides that "the Trustee may execute any of the trusts or powers hereunder . . . by or through . . . custodians." The apparent "custody" of plaintiffs' notes by custodians, which the assignment agreements explicitly allow the Trustee to use, does not imply that those agreements failed to convey ownership of plaintiffs' obligations to defendants.

CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found them to be without merit. The judgment of the district court is affirmed.